

MEMORANDUM OF LAW

DATE: November 14, 1985

TO: Councilman Ed Struiksma

FROM: City Attorney

SUBJECT: Ex Parte Contacts with Constituents Regarding
Pending Conditional Use Permits

Your memo of November 5 described a situation in which you visited the site of a proposed preschool. While at the site you were contacted by neighbors and discussed with them your reasons for not supporting the application. I assume that the applicant was not present. On November 1, 1985, the Zoning Administrator considered the application and approved it. You have asked whether you may vote on this application should an appeal come to the City Council. For the reasons expressed herein, it is my opinion that you may not vote on nor participate as a councilman in any hearing on this matter.

Both the federal and state constitutions guarantee to all citizens due process of law. When dealing with quasi-judicial matters, such as an appeal from a decision involving a conditional use permit, due process of law requires that a citizen be granted a hearing before a fair and impartial tribunal (the City Council in this case) and that the decision be based on evidence presented at such hearing. In order for the tribunal to be fair and impartial, the members thereof must not have formed opinions on the merits before all parties have been provided the opportunity to present their case in front of the tribunal. A member of the body which is charged with the responsibility of hearing the appeal may not meet privately with proponents or opponents of a project for at least two reasons. First, such a meeting deprives the absent party of the opportunity to present rebuttal to the position presented. Second, the absent members of the decision-making body are deprived of the opportunity to hear the presentation which may not be repeated before the entire body.

The applicant for a conditional use permit has the burden of establishing his entitlement to the permit in question. The parameters of his burden are established by the provisions of the Municipal Code. At each level of the administrative process, all

parties are entitled to a hearing before a hearing officer or appellate body that will decide the issues with an open mind based on the information provided at a public hearing. If the hearing officer or any member of the appellate body has formed an opinion on the issues before the public presentation, the applicant has the burden not only of showing his entitlement to the permit sought but also the burden of overcoming opinions based on information of which he is or may be unaware. Under such circumstances, it cannot be said that the applicant had a hearing before an appellate body that has considered the issues enumerated in the Municipal Code with an open mind.

In this particular case, you should not participate in the hearing if the matter comes before the City Council. Since your influence as a Councilman on the other members of the Council would in all probability be considerable, you should avoid expressing an opinion to other members of the Council. It would also be advisable to warn the local residents that they should not refer to any statements of support or opposition that you may have made.

In the future, you should avoid contacts with either proponents or opponents of a project that may come before the City Council for consideration. If contacted by such persons, you should explain that such contacts will disqualify you from

participation when the matter comes before the City Council.

Such persons should be encouraged to make their views known to the Planning Department and at all public hearings that may be held on the matter. If this procedure is followed, your right to participate will be protected and the ultimate decision will be insulated from an attack based on a claim that either party was not given a fair hearing by a fair and impartial hearing body.

JOHN W. WITT, City Attorney

By

Frederick C. Conrad

Chief Deputy City Attorney

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